

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 22, 2012

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: CITY OF LUBBOCK
SOAH DOCKET NO. 582-11-3522
TCEQ DOCKET NO. 2010-0837-WR

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,



James B. Murphy, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2010-0837-WR
SOAH DOCKET NO. 582-11-3522**

**APPLICATION BY CITY OF
LUBBOCK FOR AMENDMENT TO
WATER USE PERMIT NO. 3985**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS TO THE
PROPOSAL FOR DECISION**

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files Exceptions to the Proposal for Decision and respectfully shows the following.

I. Introduction

The City of Lubbock (the City or Applicant) applied for an amendment to its water use permit to authorize the diversion and use of all historic and future discharges of Canadian River Basin surface water-based effluent and groundwater-based effluent, including the currently authorized 10,081 acre-feet per year associated with TPDES Permit No. 10353-002, for agricultural, municipal, industrial, and recreational purposes anywhere within Lubbock and Lynn Counties. The City further applied for authorization to convey treated effluent via the bed and banks of the North Fork Double Mountain Fork Brazos River (North Fork), tributary of the Double Mountain Fork Brazos River, tributary of the Brazos River, in the Brazos River Basin, and to divert the effluent at a downstream diversion point. The City estimates carriage loss to be approximately 0.47 percent due to transportation, evaporation, seepage, and channel losses. The draft permit authorizes a maximum diversion rate of 29.45 cubic feet per second (cfs).

Water Use Permit No. 3985 originally issued May 23, 1983. It authorizes the City to use, within the Brazos River Basin, 22,910 acre-feet of treated effluent per year created as a result of the City's use of municipal water purchased from the Canadian River Municipal Water Authority, of which not to exceed 4,480 acre-feet may be supplied to Southwestern Public Service Company for industrial use at the Jones Power Plant in Lubbock County, and not to exceed 18,430 acre-feet may be supplied for agricultural use for the irrigation of 10,000 acres of land in Lubbock and Lynn Counties.

TPDES Permit No. 10353-002 originally issued May 31, 1991. It authorizes the City to discharge an annual flow not to exceed 9.0 MGD (10,081 acre-feet per year) of treated effluent into the North Fork.

The City submitted its application on April 27, 2004 and additional information on August 9, 2004 and September 2, 2004. The Commission declared the application administratively complete on October 12, 2004. The Office of Chief Clerk mailed notice of the application on December 31, 2004. Two persons entitled to notice were omitted from the mailing list, and so the Chief Clerk mailed notice to those persons on February 10, 2005. The deadline to request a contested case hearing was extended to March 14, 2005 to cure the notice defect for the two omitted persons. The City published notice of the application in the Lubbock Avalanche Journal on January 14, 2005.

The Commission received timely filed requests for a contested case hearing from: Attorney Lawrence L. Bellatti on behalf of Chocolate Bayou Water Company on January 12, 2005; Attorney George Nelson on behalf of Clark Wood, Jr., Lynn Forrest, John O. Long, and Michael and Justin Damron on January 28, 2005; John and Marianne Loveless on January 27, 2005; Mike Schneider on behalf of R.E. Janes Gravel Company (Janes Gravel) on January 31, 2005; Cathey Forrest Colwell on behalf of the

Forrest Family Partnership—Susan Evans Forrest Sparkman, Cathey Forrest Colwell, Laurie Forrest Moy, and David Lamar Forrest—on January 31, 2005; and Martha Jean Forrest McNeely on February 1, 2005. Chocolate Bayou Water Company withdrew its request on July 20, 2005.

The Commission considered the hearing requests during its open meeting held on January 26, 2011. The Commission issued an interim order on February 14, 2011 granting the hearing requests of Clark Wood, Jr., Lynn Forrest, the Forrest Family Partnership, Martha Jean Forrest McNeely, Marianne and John Loveless, and Janes Gravel, and denying the remaining requests.

On March 23, 2011, Administrative Law Judge (ALJ) Richard R. Wilfong conducted a preliminary hearing on this matter. The ALJ admitted as parties those referred by the Commission. The ALJ also admitted as conditional parties the Comanche County Growers (CCG)—George Bingham, Frazier Clark, Dwayne and Mary L. Carroll, and Robert Starks—subject to additional briefing on the group’s standing to participate as a party. Prior to a ruling on party status, the ALJ granted CCG’s request to withdraw as a party on April 14, 2011. The ALJ granted Clark Wood, Jr.’s motion for non-suit and request to withdraw as a party on May 3, 2011.

On October 18–19, 2011, the ALJ conducted an evidentiary hearing on the merits in this matter. Based on the evidence presented on the issue of “Maintenance of Instream Uses and Freshwater Inflows to Bays and Estuaries” from the agreed briefing outline, OPIC concluded Applicant did not meet its burden of proof and recommended denial of the application. In the alternative, OPIC recommended approval of the application with an additional special condition to protect instream uses and senior water rights.

On May 25, 2012, the ALJ submitted a Proposal for Decision (PFD) concluding the application and draft permit satisfy all applicable statutory and regulatory requirements and recommending the Commission adopt an order approving the application. OPIC recommends the Commission modify the ALJ's proposed order to include a special condition requiring a 5% pass through of the discharge from Outfall 1 to maintain instream uses.

II. Applicable Law

A. Current Law

This application involves two components governed by separate sections of the Texas Water Code (TWC). For the amendment to the water right to authorize a new diversion point, new municipal and recreational uses, and new locations in Lubbock and Lynn County for its use, TWC Section 11.122 controls. All holders of permits, certified filings, and certificates of adjudication must obtain authority from the Commission to alter their water right, including changing the place of use, purpose of use, point of diversion, rate of diversion, and acreage to be irrigated. TEX. WATER CODE (TWC) § 11.122(a). The Commission must approve the requested amendment unless it increases the amount of water to be diverted, the rate at which the water will be diverted, or the requested change would have an adverse impact upon other water rights holders or the environment beyond that which would occur if the water right holder seeking the amendment fully exercised the existing right. TWC § 11.122(b). *See also* 30 TEX. ADMIN CODE (TAC) § 297.45(b). The burden is on the applicant to prove that the amendment will have no adverse impact to other water right holders or the environment. 30 TAC § 297.45(d).

The Commission's rules prohibit amendments from injuring other appropriators:

An application for an amendment to a water right requesting an increase in the appropriative amount, a change in the point of diversion or return flow, an increase in the consumptive use of the water based upon a comparison between the full, legal exercise of the existing water right with the proposed amended right, an increase in the rate of diversion, or a change from the direct diversion of water to on-channel storage shall not be granted unless the commission determines that such amended water right shall not cause adverse impact to the uses of other appropriators.

30 TAC § 297.45(a). Adverse impact to other appropriators includes: (1) the possibility of depriving an appropriator of the equivalent quantity or quality of water that was available with the full, legal exercise of the existing water right before the change, (2) increasing an appropriator's legal obligation to a senior water right holder, and (3) otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time the appropriator's water right was granted. 30 TAC § 297.45(a). The Commission "may direct that stream flow restrictions, return flows, and other conditions and restrictions be placed in the permit being issued to protect senior water rights." 30 TAC § 297.45(e).

The Commission must consider effects on groundwater quality, groundwater uses, groundwater recharge, aquatic and wildlife habitat, bays and estuaries, and existing instream uses including recreation, navigation, and federally listed species.

TWC §§ 11.150; TAC §§ 297.47, 297.53, and 297.55–297.56. The Commission must also consider effects on water quality:

Assessment of water quality impacts shall consider the maintenance of State of Texas Surface Water Quality Standards provided by Chapter 307 of this title (relating to Texas Surface Water Quality Standards) and the need for all existing instream flows to be passed up to that amount necessary to maintain the water quality standards for the affected stream. Such flows may also be used to protect uses of existing, downstream water

rights by providing water of a usable quality and to provide, in part, for the protection of vested riparian water rights and domestic and livestock uses.

30 TAC § 297.54. The application must be “consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located.” TWC § 11.134(b)(3)(E). *See also* 30 TAC § 297.41(a)(1)(E). In addition, the Commission may approve an amendment only if it would not be detrimental to the public welfare. 30 TAC § 297.46.

For applications for a permit to divert water in excess of 5,000 acre-feet per year, the Commission “shall assess the effects, if any, on the issuance of the permit on fish and wildlife habitats and may require the applicant to take reasonable actions to mitigate adverse impacts on such habitat.” TWC § 11.152. The Commission must include any “condition, restriction, limitation or provision reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission.” 30 TAC § 297.59(a). Finally, the amendment also must “meet all other applicable requirements” of TWC Chapter 11, including those found in TWC § 11.134(b). TWC § 11.122(b). *See also City of Marshall v. Uncertain*, 206 S.W.3d 97, 109–111 (Tex. 2006).

For the amendment to the water right authorizing diversion and use of groundwater-based return flows and delivery down the bed and banks of the North Fork, TWC Section 11.042 controls. *See also* 30 TAC § 297.16 (incorporating statutory language). Authorizations to use the bed and banks of a watercourse to convey water are subject to different requirements depending on the source of the conveyed water. Section 11.042(b) applies to privately owned groundwater:

A person who wishes to discharge and then subsequently divert and reuse the person's existing return flows derived from privately owned groundwater must obtain prior authorization from the commission for the diversion and the reuse of these return flows. The authorization may allow for the diversion and reuse by the discharger of existing return flows, less carriage losses, and shall be subject to special conditions if necessary to protect an existing water right that was granted based on the use or availability of these return flows. Special conditions may also be provided to help maintain instream uses and freshwater inflows to bays and estuaries. A person wishing to divert and reuse future increases of return flows derived from privately owned groundwater must obtain authorization to reuse increases in return flows before the increase.

Section 11.042(c) applies to all sources of water except stored or conserved water and privately owned groundwater:

[A] person who wishes to convey and subsequently divert water in a watercourse or stream must obtain the prior approval of the commission through a bed and banks authorization. The authorization shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions that may address the impact of the discharge, conveyance, and diversion on existing permits, certified filings, or certificates of adjudication, instream uses, and freshwater inflows to bays and estuaries. Water discharged into a watercourse or stream under this chapter shall not cause a degradation of water quality to the extent that the stream segment's classification would be lowered.

Commission rules also require that the water discharged into the watercourse or stream not cause a degradation of water quality as provided by 30 TAC § 307.5 and that water quality sufficient to protect existing uses is maintained. 30 TAC § 297.16(c).

Owners of land adjacent to a stream or watercourse, known as riparian users, may directly divert and use water for domestic and livestock purposes without obtaining a permit or other authorization. TWC § 11.303(*D*); 30 TAC § 297.21. The Commission describes riparian use for domestic and livestock purposes as a “vested right that predates the prior appropriation system in Texas and is superior to appropriative rights.” 30 TAC § 297.21(a). The vested riparian right “is only to the normal flow in the

stream, not to the storm water, floodwater, or authorized releases from storage for downstream use.” 30 TAC § 297.21(a).

B. History of Texas Water Code Section 11.042

TWC Subsections 11.042(b)–(c) are components of the Legislature’s comprehensive system of water rights management enacted in 1997. *See* Senate Bill 1, Act of June 1, 1997, 75th Leg., R.S., ch. 1010, § 2.06 (SB 1). Prior to SB 1, Section 11.042 only applied to delivery of contracted water down beds and banks, and had no bearing on the reuse application at issue here. *Compare* Senate Bill 249, Act of June 15, 1985, 69th Leg., R.S., ch. 795, § 1.006 *with* SB 1. Rather, reuse of surface water and groundwater was governed by the common law. The common law was unclear, however, on the legal character of groundwater when it reenters a watercourse and whether it becomes state water subject to appropriation upon reentry. *See Edwards Aquifer Authority v. Day*, 274 S.W.3d 742–755 (Tex. App. 2008) (reviewing case law on whether groundwater becomes state water subject to appropriation once it reenters a watercourse); *City of San Marcos v. Tex. Comm’n on Env’tl. Quality*, 128 S.W.3d 264, 269–278 (Tex. App. 2004) (reviewing case law on whether privately owned groundwater-based effluent becomes state water subject to appropriation once it reenters a watercourse).

In 2006, the Commission considered a motion to overturn on applications by the City of Bryan and the City of College Station to reuse return flows derived exclusively from privately owned groundwater. *See* An Interim Order concerning the Motion to Overturn filed by the City of Bryan and the City of College Station regarding the Executive Director’s decisions to return Application Nos. 5912 and 5913 pursuant to 30 Texas Administrative Code Section 281.18 without prejudice to their re-submission;

TCEQ Docket Nos. 2006-1832-WR and 2006-1831-WR (Dec. 20, 2006) (Bryan/College Station Order). The Commission determined “as a matter of law that the Cities’ applications do not involve state water based on Section 11.042(b) of the Water Code” and ordered the ED to process the applications for bed and banks authorizations solely under Section 11.042(b) and not under Commission rules applicable to state water. Bryan/College Station Order, at Ordering Provision Nos. 2–3. The Commission limited the Bryan/College Station Order to bed and banks authorizations that involved exclusively groundwater-based return flows. Bryan/College Station Order, at Ordering Provision No. 5. The Legislature has not amended Subsections 11.042(b) and (c) since 1997.

Recently, the Texas Supreme Court clarified the character of groundwater when it enters a watercourse in *Edwards Aquifer Authority v. Day*, 2012 WL 592729 (Tex.), 55 Tex. Sup. Ct. J. 343 (Tex. 2012). On the question of whether groundwater becomes state water when it enters a watercourse, the Court stated,

There is an exception. Groundwater can be transported through a natural watercourse without becoming state water. The Code specifically allows the Water Commission to authorize a person to discharge privately owned groundwater into a natural watercourse and withdraw it downstream. [TWC § 11.042(b).] But this exception proves the rule. The necessary implication is that when the water owner has not obtained the required authorization for such transportation, the water in the natural watercourse becomes state water. Before such authorization was required [in 1997], we, too, acknowledged the propriety of transporting non-state-owned water by natural watercourse, but only when the water owner controls the discharge and withdrawal so that the water moves directly from the source of use. *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 802–803 (Tex. 1955).

Day, 2012 WL 592729, at *4.

III. Discussion

A. Special Condition to Maintain Instream Uses

The Water Code and Commission rules require a more thorough environmental review than was performed in this matter. There is little evidence in the record to conclude the City's diversion will not cause adverse impacts to instream uses along the North Fork. Accordingly, OPIC recommends the Commission include an additional special condition in the permit to protect instream uses from potential adverse impacts from the City's diversion.

The North Fork is a "prairie stream ecosystem with significant overall habitat value as well as the presence of exemplary native prairie-stream fish community, including [two species of fish] on Texas' list of species of concern."¹ The North Fork also supports other wildlife species, even during intermittent flows.² According to the State of Texas Water Quality Inventory, 305(b)/303(d) Report, the North Fork supports aquatic life and contact recreation uses.³ Water-based recreational uses occur at a number of downstream reservoirs, which are described by the City's Director of Water Resources as recreational lakes.⁴ There is riparian vegetation along the North Fork.⁵ The City's discharge sometimes comprises the entirety of the flow of the North Fork.⁶

As acknowledged in the PFD, the City's expert hydrologist David Dunn did not perform an independent environmental review on this application and did not conduct a site visit focused on environmental effects, but instead reviewed and agreed with the

¹ Ex. ED3985A-6, at 2 (Memo from John Botros, Aquatic Scientist, to Julie Wood, Project Manager, dated July 20, 2005) (Environmental Analysis).

² Tr. (76:6-76:15) (Spear).

³ Ex. ED3985A-6, at 4 (Environmental Analysis).

⁴ Ex. ED3985A-6, at 2 (Environmental Analysis); Tr. (74:23-75:24) (Spear).

⁵ Tr. (76:3-76:5) (Spear).

⁶ Tr. (67:21-68:5) (Spear).

Environmental Analysis and Addendum prepared by ED staff.⁷ The City also acknowledges “that Mr. Dunn was not attempting to provide expert testimony regarding instream uses as a biologist.”⁸ On cross-examination, Mr. Dunn did not demonstrate any expertise in biology, and did not know how long it would take for aquatic organisms and riparian vegetation to rely on water in a watercourse.⁹

Although it is appropriate for an applicant’s expert to review and rely on the technical review performed by ED staff, the ED’s review in this matter is inadequate to demonstrate maintenance of instream uses. First and foremost, the review is out-of-date. The Environmental Analysis review occurred in 2005 and the Addendum in 2006. Nine years have passed since the discharge began from Outfall 1, which is sufficient time for aquatic life to rely on the discharge.

The Environmental Analysis also appears incomplete. It describes the conditions of the North Fork in 2005, but makes no conclusions as to effects on aquatic life or species of concern. The only conclusions concern freshwater inflows to bays and estuaries and recreational uses.¹⁰ The Addendum recognizes the presence of aquatic organisms and recommends a special condition requiring a screen mesh at the diversion point to minimize entrainment and impingement.¹¹ This special condition supports the conclusion that aquatic life is present near the proposed diversion point, and yet neither environmental memo discusses the potential effects of reduced flows on aquatic life. Because there is no conclusion as to effects on aquatic life, it is unclear if the review

⁷ PFD, at 20. See Tr. (186:15–187:1) (Dunn); Tr. (327:5–327:7) (Alexander); COL 3985A Ex. 9, at 45:6–47:5 (Dunn prefiled testimony). See also Environmental Analysis; Ex. ED3985A-7 (Memo from John Botros, Aquatic Scientist, to David Koinm, Application Manager, dated September 26, 2006) (Addendum).

⁸ PFD, at 21.

⁹ Tr. (187:9–187:13) (Dunn).

¹⁰ Ex. ED3985A-6, at 4–5 (Environmental Analysis).

¹¹ Ex. ED3985A-7, at 1 (Addendum).

overlooked the issue or instead determined that the amount or duration of the discharge was insufficient for aquatic life to rely on. If the duration of the discharge is a basis for concluding there will be no adverse effects on aquatic life, then this conclusion is no longer supportable because approximately 6 years have passed since Mr. Botros's latest review.

ED expert Kathy Alexander reviewed the Environmental Analysis and Addendum, and concluded that instream uses will be maintained.¹² However, she did not perform any environmental analysis in this matter or conduct a site visit.¹³ On cross-examination, Ms. Alexander did not know how long it takes for aquatic vegetation or fish and wildlife species to rely on water in a watercourse.¹⁴ As a result, it does not appear there's been any significant, up-to-date analysis of the potential effects on aquatic organisms and riparian vegetation from reduced flows in the North Fork. This lack of evidence is concerning because the potential for adverse effects to aquatic life is particularly acute when the City's discharge at times comprises the entire flow of the North Fork.

The testimony of Janes Gravel expert Tom Koch supports OPIC's conclusion that the environmental review performed in this matter was inadequate. Mr. Koch testified that the environmental conditions present along the North Fork in 2005 when the Environmental Analysis was prepared are no longer representative of current conditions.¹⁵ Mr. Koch states that, at a minimum, flow restrictions should be included in the draft permit to maintain flows.¹⁶

¹² Tr. (327:22–327:25) (Alexander); Ex. ED3985A-11, at 15:4–15:12.

¹³ Tr. (286:17–288:21) (Ellis); Tr. (327:19–327:21) (Alexander).

¹⁴ Tr. (330:17–330:23) (Alexander).

¹⁵ Ex. Janes A, at 54:13–54:15 (Koch prefiled testimony).

¹⁶ Ex. Janes A, at 54:13–54:15 (Koch prefiled testimony).

To the extent the ALJ's conclusion that instream uses will be maintained rests on the City's argument that OPIC made an untimely evidentiary objection, OPIC requests the ALJ reconsider the evidence.¹⁷ The City repackaged OPIC's argument questioning Mr. Dunn's knowledge of effects on aquatic organisms and riparian vegetation as an untimely *Daubert-Robinson* objection to expert testimony, perhaps understandable given OPIC's ambiguous use of the term "unqualified." But OPIC made no such evidentiary objection, nor intended one. OPIC's argument is that Mr. Dunn's lack of knowledge of biology, aquatic organisms, and riparian vegetation on cross-examination makes his testimony unpersuasive.

In addition, Mr. Dunn's conclusion that there was insufficient time for instream uses to rely on the discharge is based on an artificial, inaccurate review period, which brings into question the persuasive weight to be given to his testimony.¹⁸ In concluding insufficient time passed for reliance on the discharge, Mr. Dunn refers to the time period between the commencement of discharge and the declaration of administrative completeness for this application, which was approximately 17 months.¹⁹ There is no basis in law for limiting environmental review to this period. Aquatic organisms and riparian vegetation rely on this water regardless, and there is no dispute 9 years have now passed since the City began discharging from Outfall 1 in May 2003.

To address this uncertainty, OPIC recommends a special condition requiring a pass through of 5% of the discharge from Outfall 1. OPIC recognizes there is little evidence in the record on the amount of water necessary to maintain instream uses and a 5% pass through may or may not be sufficient. But that is the very problem the special

¹⁷ PFD, at 21–22.

¹⁸ COL 3985A Ex. 9, at 46:21–47:3 (Dunn prefiled testimony).

¹⁹ Tr. (181:1–181:5) (Dunn); COL 3985A Ex. 9, at 46:21–47:3 (Dunn prefiled testimony).

condition addresses. In the absence of information on what amount of water is necessary to prevent adverse impacts to aquatic organisms and riparian vegetation, the special condition provides some protection against this uncertainty. OPIC argues there is an adequate basis in the record to include this condition.

First, Commission rules reserve 5% of the annual firm yield of a reservoir or associated water works within 200 miles of the coast to pass through to maintain beneficial inflows to bays and estuaries. 30 TAC § 297.55(c). Although this provision does not apply to this application, it demonstrates the Commission considers 5% a rebuttable, presumptive amount sufficient to prevent adverse effects on the environment in certain circumstances.

Second, the record includes testimony regarding the accuracy of the measuring device used to ensure the proper quantity of water is diverted.²⁰ The draft permit requires a measuring device which accounts for the quantity of the diversion within 5% accuracy.²¹ Based on calculations performed at hearing, the error rate of the measuring device has the potential to consume 504 acre-feet annually above the 10,081 acre-feet authorized by the draft permit.²² A 5% pass through condition protects against such a scenario, and also protects against adverse impacts on aquatic organisms and riparian vegetation.

Finally, a pass through condition is supported by the testimony of Janes Gravel expert Tom Koch, who recommends in the alternative to denial that the draft permit include a flow restriction or pass through amount to protect senior water rights.²³ Thus,

²⁰ Tr. (224:17–225:22) (Dunn); Tr. (325:11–326:14) (Alexander).

²¹ Ex. ED3985A-10, at 5 ¶E (Draft permit).

²² Tr. (224:17–225:22) (Dunn).

²³ Ex. Janes A, at 54:13–54:15, 56:1–56:4 (Koch prefiled testimony).

the concept of a pass through special condition is appropriate and supported by the record.

As reuse becomes an increasingly important source of water in Texas, OPIC recommends a more thorough review process for environmental effects than conducted in this matter. Discharged effluent represents a significant portion of the flow of many watercourses, including the North Fork. OPIC argues the Commission should require more than a 6 year-old, cursory environmental review before approving this amendment. Accordingly, OPIC recommends an additional special condition to ensure maintenance of instream uses.

B. Additional Exceptions

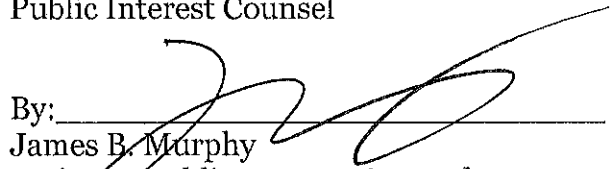
- Page 8, first full paragraph: Remove reference to OPIC contending that TWC § 11.046 applies in this matter. OPIC did not argue that point at the post-hearing conference, but did argue that 11.134(b) is applicable.
- Finding of Fact 94: Based on the arguments above, OPIC disputes this finding and requests its removal.
- Conclusion of Law 10: The first clause conflicts with the conclusion in page 8 of the PFD that 11.134(b) applies in part, and should be removed.
- Conclusion of Law 15: If the Commission adopts OPIC's recommendation of an additional special condition, the second sentence should be removed.

IV. Conclusion

OPIC recommends a special condition requiring a 5% pass through of the discharge from Outfall 1 to maintain instream uses.

Respectfully submitted,

Blas J. Coy, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2012, the original and seven copies of the Office of Public Interest Counsel's Exceptions to the Proposal for Decision were filed with the Chief Clerk of the TCEQ, a copy was filed with the Docket Clerk of the State Office of Administrative Hearings, and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.


James B. Murphy

CITY OF LUBBOCK
SOAH DOCKET NO. 582-11-3522
TCEQ DOCKET NO. 2010-0837-WR

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